be pursued on Sunday; such soft drinks not being those customarily taken with meals.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 1040.]

Suit by Thomas J. Pearson against H. G. Johnston and others.

Error to Circuit Court, Alleghany County.

Z. N. Ellis was convicted of violating a municipal ordinance by laboring at his trade or calling of selling Coca-Cola on Sunday, and, the conviction being sustained on appeal to the circuit court, he brings error. Affirmed.

W. E. Allen, of Covington, for plaintiff in error.
R. C. Stokes, of Covington, for defendant in error.

McCLUNG *v.* FOLKES.

Nov. 15, 1917.

[94 S. E. 156.]

1. Appeal and Error (§ 1047 (1)*)—Review—Harmless Error—Reception of Evidence.—Where defendant in error was successful on the last trial, and asserted the correctness of such disposition, the action of the lower court in requiring him, as a condition to introducing evidence, to waive his bills of exception to the action of the court in setting aside the first verdict in his favor, need not be considered, being harmless.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 592.]

2. Appeal and Error (§ 218 (1)*)—Review—Verdict—Necessity of Objection to Instructions.—Where there was no objection to the instructions, a verdict on conflicting evidence cannot be reviewed by the appellate court.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 563, 620.]

3. Costs (§ 47*)—Prevailing Party—Disclaimer.—Where defendant in error, who had judgment below, did not disclaim all of the land in controversy, plaintiff in error, not having accepted the disclaimer in satisfaction of his claim, was not entitled to costs up to the time of the disclaimer, and costs were properly allowed to defendant in error under Code 1904, § 3545, declaring that, except where otherwise provided, the party for whom final judgment is given shall recover his costs.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 610, 613.]

Error to Circuit Court, Highland County.

Application by C. C. Folkes for an inclusive survey of land. L. McClung filed a caveat to prevent applicant from obtaining

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

a new grant upon a resurvey of his lands. In proceedings on the caveat, there was a judgment for caveatee, and the caveator brings error. Affirmed.

Jos. A. Glasgow, of Staunton, and *John M. Colaw,* of Monterey, for plaintiff in error.

Curry & Curry and *Timberlake & Nelson,* all of Staunton, and *Andrew L. Jones,* of Monterey, for defendant in error.

HUMMER et al. *v.* COMMONWEALTH.

Nov. 15, 1917.

[94 S. E. 157.]

1. **Criminal Law (§ 814 (1)*)—Instructions—Applicability.**—Defendants were indicted on the charge of having unlawfully and feloniously cut and wounded another. Code 1904, § 3671, declaring that, if any person shall maliciously cut or wound another with intent to maim, etc., he shall be punished, etc., and that if the act be done unlawfully, but not maliciously, the offender shall be subject to a less punishment, was read by the clerk to the jury, and requested instructions that defendants could not be found guilty of malicious cutting were refused. Held, that the reading of the entire section, part of which was inapplicable to the offense with which defendants were charged, was error.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 717.]

2. **Criminal Law (§ 1172 (9)*)—Appeal—Harmless Error.**—As the jury did not assess the minimum punishment for unlawful and felonious assault, the reading of Code 1904, § 3671, which mentioned a greater punishment, must be deemed prejudicial error.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 600.]

Error to Circuit Court, Clarke County.

Jeff Hummer and Weita Costello were separately indicted, but jointly tried, on the charge of having unlawfully and feloniously cut and wounded another. There were judgments of conviction, and defendants bring error. Reversed and remanded.

Marshall McCormick, of Berryville, for plaintiffs in error.

The Attorney General, for the Commonwealth.

VIRGINIA PORTLAND CEMENT CO. *v.* SWISHER'S ADM'R.

Nov. 15, 1917.

[94 S. E. 159.]

1. **New Trial (§ 71*)—Verdict Contrary to Evidence—Conflicting Evidence.**—On motion to set aside the verdict as contrary to the

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.